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ANUAR GHAZALI v. PP

HIGH COURT MALAYA, SHAH ALAM
NOORIN BADARUDDIN J
[CRIMINAL APPLICATION NO: BA-44-21-01-2020]
6 NOVEMBER 2020

B

CRIMINAL PROCEDURE: *Charge – Defective charge – Accused charged for breach of trust – Penal Code, s. 405 – Allegation that charge failed to specify method in which accused allegedly committed offences – Whether charge defective – Whether there was non-compliance of s. 154 of Criminal Procedure Code ('CPC') –*

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Whether charge ought to be struck out – Whether court seized with power to direct Public Prosecutor to amend charges before commencement of trial – Whether s. 156 of CPC could cure objections to defective charges raised at outset of trial – Whether High Court could exercise inherent powers and/or jurisdiction to set aside or strike out criminal proceedings on ground of failure to comply with s. 154 of CPC

D

CRIMINAL PROCEDURE: *Charge – Striking out – Res judicata – Accused/applicant charged for breach of trust – Penal Code, s. 405 – Allegation that charge failed to specify method in which accused allegedly committed offences – Applicant's application to Magistrate for orders ordering prosecution to amend charges dismissed – Applicant sought revision of Magistrate's decision – Whether oral judgment of*

E

High Court Judge touched on applicant's main gripe – Whether applicant could commence new application to strike out charge – Whether res judicata set in

The applicant was charged at the Magistrate's Court for two charges of breach of trust under s. 405 of the Penal Code, punishable under s. 406 of the same Code ('two original charges'). After the two original charges were

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read to the applicant but before he gave a plea of not guilty, the applicant raised a preliminary objection towards the two original charges on the ground that they did not comply with s. 154 of the Criminal Procedure Code ('CPC'), namely that the two original charges failed to specify the method in which the applicant was said to have committed the offences. The respondent

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('prosecution') then preferred two amended charges on the applicant ('two amended charges (no 1)'). Again, after the two amended charges (no 1) were read to the applicant but before he gave a plea of not guilty, the applicant raised a preliminary objection towards the two amended charges (no 1) on the ground that they still did not comply with s. 154 of the CPC. The

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prosecution then preferred two new amended charges ('two amended charges (no 2)'). The applicant filed an application for orders ordering the prosecution, before the commencement of the trial, to amend the two amended charges (no 2) by (i) identifying the contract that was said to have specified the way in which a trust was allegedly conferred on the applicant;

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and (ii) particularising the terms of the contract, whether express or implied,

that was said to have specified the way in which a trust was allegedly conferred on the applicant. The Magistrate dismissed the applicant's application and proceeded to set the trial dates for the two amended charges (no 2). The applicant then filed a revision application, at the High Court, against the Magistrate's decision ('revision application') but the revision application was dismissed on the grounds that (i) the court did not have power/jurisdiction to order the prosecution to amend the two amended charges (no 2) before the start of the trial; and (ii) s. 156 of the CPC ties the court's hands unless there were reasons to believe that the applicant was misled by the two amended charges (no 2) ('second reasoning of High Court Judge's ('HCJ') oral judgment'). In the present application, the applicant sought, *inter alia*, to strike out the two amended charges (no 2) ('charges') against him on the grounds that (i) the HCJ did not make any findings as to whether the charges were defective and, as such, the doctrine of *res judicata* did not apply; (ii) the High Court had inherent power and/or jurisdiction to set aside or strike out proceedings that are an abuse of process; (iii) the charges did not comply with s. 154 of the CPC and such non-compliance infringed the applicant's constitutional rights and rendered the proceedings in the subordinate court null and void; (iv) s. 156 of the CPC could not (a) cure objections to defective charges raised at the outset of the trial; and (b) prevent a court from striking out proceedings that are an abuse of process. Objecting to the applicant's application, the prosecution argued that (i) the application was irregular and an abuse of the process of the law as the matters raised by the applicant had been raised in the revision application where the HCJ upheld the decision of the Magistrate in dismissing the applicant's application and directed for the trial to be proceeded with at the lower court; (ii) the applicant ought to have appealed against the HCJ's decision; and (iii) the present court had no power to direct the prosecution to amend the charges before the commencement of the trial as the evidence has yet to be tendered before the court. The primary issues that arose for adjudication concerned (i) the issue of *res judicata*; and (ii) whether the High Court could exercise its inherent powers and/or jurisdiction to set aside or strike out criminal proceedings on the ground of failure to comply with s. 154 of the CPC.

Held (allowing application; striking out amended charges preferred against applicant in Magistrate's Court):

(1) There was no evidence of *res judicata*. Although the applicant's revision application was for the prosecution to amend the charges, the basis of which was that the charges were in contravention of s. 154 of the CPC, the oral judgment of the HCJ was silent as to whether the charges, in fact and in law, contravened the same section. If indeed there was a finding that there was no contravention of s. 154 of the CPC in the revision application, then the second reasoning of the HCJ's oral judgment was rendered unnecessary. The fact that the HCJ came to His Lordship's

second reasoning, that the court had no power to order the prosecution to amend the charges, opened a higher probability of speculation that the HCJ might have found the charges were in contravention of s. 154 of the CPC but the court did not have the power to order the prosecution to amend the charges. (para 34)

(2) The two amended charges (i) contained no specificity as to the legal contract which the appellant allegedly breached; and (ii) failed to state the specific illegal act that the applicant had committed that tantamount to a violation of the contract. A charge for criminal breach of trust must specify the particular direction or law or contract that has been breached, which was what the applicant sought in the revision application. Particularisation under s. 154 of the CPC is required so as to give notice to the applicant for him to know exactly what he was answering to. In doing so, only then the applicant would be able to prepare his defence to contradict and rebut the evidence that is to be adduced. The two amended charges were, therefore, defective, as they failed to comply with the mandatory requirements under s. 154 of the CPC. (paras 51, 53 & 54)

(3) The applicant's right to be informed, manifested in ss. 153 and 154 of the CPC, was not only a constitution-protected right but was a right which must be given at the very start of the indictment against him which could not be delayed until the end of the trial to see whether the accused had, in fact, been prejudiced. The applicant could not be forced to go through a criminal proceeding which disregarded or was inconsistent with the requirement of the law, *ie,* s. 154 of the CPC. It would tantamount to an abuse of process and would diminish the applicant's quality of life, which was the facet of the right protected by art. 5(1) of the Federal Constitution ('FC'). A breach of procedural fairness had occurred and caused prejudice to the applicant. The High Court is vested with the power and jurisdiction to arrest a wrong at *limine*. The infringement of the applicant's constitutional rights was an abuse of process that was sufficient to trigger the court's inherent power to strike out the proceedings in the Magistrate's Court. (paras 62 & 74)

(4) The defective charges due to non-compliance of s. 154 of the CPC was not curable under ss. 156 and/or 158 and/or 422 of the CPC since the objection had been raised before the commencement of the trial. Sections 156 and 422 of the CPC would only apply when there is sufficient material before the court to see that the accused had been misled. Sufficient material before the court would mean when witnesses have been called or, at the very least, when the proceedings have reached a stage where the trial judge has sufficient material before him to conclude that the accused had been misled. Until and unless evidence

or some material has been produced, the court could not decide whether the accused had been misled or otherwise. Section 156 of the CPC only applies with respect to or after any finding, judgment, sentence or order passed or made by a court. Sections 156 and 422 of the CPC could not be used to oust any objection towards defective charges taken at the outset of the trial. Section 156 of the CPC is not a provision which could cure the non-particularisation of the charges which was a mandatory requirement of the law under s. 154 of the CPC. The requirement of s. 154 of the CPC must first be fulfilled and s. 156 of the CPC could not be a shield to any objection of non-compliance of s. 154 of the CPC. The words 'at any stage of the case' in s. 156 of the CPC, therefore, could not apply before the commencement of the trial. The statutory mechanism of s. 156 of the CPC, if used to cure proceedings which are defective *ab initio* and violates the constitutional rights of an accused, is an abuse of process rendering the proceedings in the Magistrate Court a nullity. (para 85)

(5) The power of the Attorney General, exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence, pursuant to art. 145(3) of the FC, would always be recognised. However, once the matter is brought before the court and contested, the court has inherent powers to address the matter and remedy the situation. Section 156 of the CPC could not tie the court's hands and mandate a trial in which the applicant is deprived in preparing his defence and quality of life. (para 110)

Case(s) referred to:

Ah Thian v. Government of Malaysia [1976] 1 LNS 3 FC ***(refd)***
Ahmad Zubair Hj Murshid v. PP [2014] 1 CLJ 697 CA ***(refd)***
Ahmad Zubair Hj Murshid v. PP [2014] 9 CLJ 289 FC ***(refd)***
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Assa Singh v. Menteri Besar, Johore [1968] 1 LNS 9 FC ***(refd)***
Baker v. R [1975] AC 774 ***(refd)***
Cheam Tat Peng v. PP [1996] 1 SLR 541 ***(refd)***
Connelly v. DPP [1964] 2 All ER 401 ***(refd)***
Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1981] 1 MLJ 29 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***
Director of Public Prosecutions v. Humphrys [1976] 2 All ER 497 ***(refd)***
Hj Maamor Hj Abdul Manap v. PP [2003] 1 CLJ 370 HC ***(refd)***
Kanwar Sain v. The Crown (1938) ILR 19 (Lahore) 662 ***(refd)***
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***
Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Liyanage and Others v. Reginam [1966] 1 All ER 650 ***(refd)***
Metropolitan Bank Ltd v. Pooley [1885] 10 App Cas 210 ***(refd)***
Mills v. Cooper [1967] 2 All ER 100 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
PP v. Anuar Arshad [1996] 1 SLR(R) 496 ***(refd)***

PP v. Dato' Yap Peng [1987] 1 LNS 28 HC ***(refd)***
PP v. Gan Boon Aun [2017] 4 CLJ 41 FC ***(refd)***
PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***
PP v. Mohd Fazil Awaludin [2009] 2 CLJ 862 HC ***(refd)***
PP v. Raymond Chia Kim Chwee & Another Case [1983] 1 CLJ 321; [1983] CLJ (Rep) 798 HC ***(refd)***
PP v. Teoh Choon Teck [1962] 1 LNS 141 HC ***(refd)***
PP v. Yeoh Teck Chye [1981] 1 LNS 93 FC ***(refd)***
R v. Ashton [2007] 1 WLR 181 ***(refd)***
R v. London Borough of Lambeth Council [1988] 55 P & C R 232 ***(refd)***
R v. Rackham [1997] 2 Cr App R 222 ***(refd)***
R v. Sekhon and Others [2003] 3 All ER 508 ***(refd)***
Ravindran Ramasamy v. PP [2015] 3 CLJ 421 FC ***(refd)***
Re Tan Boon Liat & Anor And Another Appeals [1977] 1 LNS 110 FC ***(refd)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 HC ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor And Another Appeal [1998] 3 CLJ 85 CA ***(refd)***
Tan Peng Ann v. PP [1949] Supp MLJ 10 ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***
Zulkiflee Mohd Dom v. PP [1997] 3 CLJ Supp 290 HC ***(refd)***

Legislation referred to:
Aboriginal Peoples Act 1954, ss. 11, 12
Criminal Procedure Code, ss. 51A, 152, 153, 154, 156, 418, 418A, 422
Dangerous Drugs Act 1952, s. 37(d), (da)
Federal Constitution, arts. 4, 5(1), 121(1), 145(3), 162(2)
Penal Code, ss. 405, 406
Securities Commission Malaysia Act 1993, s. 39(2)
Securities Industry Act 1983 (repealed), s. 126(2)

Other source(s) referred to:
Archbold Criminal Pleading, Evidence and Practice 2009, paras 4-155
Cross and Harris, Precedent in English Law, 4th edn, Oxford: Clarendon Press, pp 158-159

For the applicant - Kamarul Hisham Kamaruddin; M/s The Chambers of Kamarul Hisham & Hasnal Rezua
For the respondent - Devinderjit Kaur Gill; DPP

Reported by Najib Tamby

JUDGMENT

Noorin Badaruddin J:

[1] This is an application by the applicant, Anuar bin Ghazali who was charged in the Magistrate's Court in Petaling Jaya on 4 April 2019 for two charges under s. 405 of the Penal Code ("PC") seeking *inter alia* for the amended charges preferred against him by the respondent be set aside, struck out or stayed *in limine* on the following grounds:

(i) that the charges do not comply with s. 154 of the Criminal Procedure Code ("CPC");

(ii) that the non-compliance with s. 154 infringes the applicant's constitutional rights and renders the proceedings in the subordinate court null and void;

(iii) that s. 156 CPC cannot cure objections towards defective charges raised at the outset of trial; and

(iv) that s. 156 CPC cannot prevent a court from striking out proceedings that are abuse of process.

[2] This court has allowed the application and the reasons now follow.

Facts

[3] The applicant is the Chief Executive Officer and one of the directors of Carriercorp Petroleum Sdn Bhd ("the company") at the material time. The company is stated to be trading in supplying fuel/petroleum to suppliers and its customers.

[4] The applicant was charged in the Magistrate's Court in Petaling Jaya for two charges under s. 405 of the PC punishable under s. 406 PC.

[5] The original charges preferred against the applicant are as follows:

Pertuduhan Pertama

Bahawa kamu pada 16/12/2015 di Lapangan Terbang Sultan Abdul Aziz Shah dalam daerah Petaling, di negeri Selangor, yang diamanahkan penguasaan ke atas harta iaitu minyak Jet A1 berjumlah 16380 liter yang mana kamu telah melakukan satu pecah amanah jenayah berkenaan dengan harta tersebut dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 406 Kanun Keseksaan.

Pertuduhan Kedua

Bahawa kamu pada 18/12/2015 di Lapangan Terbang Sultan Abdul Aziz Shah dalam daerah Petaling, di negeri Selangor, yang diamanahkan penguasaan ke atas harta iaitu minyak Jet A1 berjumlah 20000 liter yang mana kamu telah melakukan satu pecah amanah jenayah berkenaan dengan harta tersebut dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 406 Kanun Keseksaan.

(Hereinafter referred to collectively as "two original charges")

[6] On 4 April 2019, after the two original charges were read to the applicant but before he gave a plea of not guilty, learned counsel for the applicant raised a preliminary objection towards the two original charges on the ground that they did not comply with s. 154 of the CPC, namely that the two original charges failed to specify the method in which the applicant is said to have committed the offences.

[7] The documents under s. 51A CPC were served on the applicant on the mention date on 8 May 2019.

[8] A notice of application dated 27 May 2019 ("NOA No. 1") was filed by the applicant in the Magistrate's Court which encompassed the preliminary objection raised by applicant's counsel on 4 April 2019.

[9] During the mention on 24 June 2019 (and before the hearing of the NOA No. 1), the learned Deputy Public Prosecutor ("DPP") preferred two amended charges on the applicant which read as follows:

> **Pertuduhan Pindaan Pertama**
>
> Bahawa kamu pada 16/12/2015 di Lapangan Terbang Sultan Abdul Aziz Shah, dalam daerah Petaling, di negeri Selangor yang diamanahkan dengan harta iaitu minyak Jet berjumlah 20,000 liter milik A1 (Ab Jalil bin Ninggal (no. K/p: 540721-04-5215)) iaitu pemegang saham syarikat Carriercorp Petroleum telah melakukan pecah amanah jenayah iaitu dengan curangnya melepaskan harta itu dengan melanggar apa-apa kontrak yang menetapkan cara bagaimana amanah itu perlu disempurnakan, yang nyata (atau disifatkan ada) mengenai penyempurnaan amanah itu dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 406 Kanun Keseksaan.
>
> **Pertuduhan Pindaan Kedua**
>
> Bahawa kamu pada 18/12/2015 di Lapangan Terbang Sultan Abdul Aziz Shah, dalam daerah Petaling, di negeri Selangor yang diamanahkan dengan harta iaitu minyak Jet berjumlah 16,380 liter milik A1 (Ab Jalil bin Ninggal (no. K/p: 540721-04-5215)) iaitu pemegang saham syarikat Carriercorp Petroleum telah melakukan pecah amanah jenayah iaitu dengan curangnya melepaskan harta itu dengan melanggar apa-apa kontrak yang menetapkan cara bagaimana amanah itu perlu disempurnakan, yang nyata (atau disifatkan ada) mengenai penyempurnaan amanah itu dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 406 Kanun Keseksaan.

(Hereinafter referred to collectively as "two amended charges (no. 1)")

[10] On 24 June 2019, after the two amended charges (no. 1) were read to the applicant but before he gave a plea of not guilty, learned counsel for the applicant raised a preliminary objection towards the two amended charges (no. 1) on the ground that they still did not comply with s. 154 CPC, namely:

(i) Failed to identify the contract that is said to have specified the way in which a trust was allegedly conferred on the applicant as stated in the two amended charges (no. 1); and

(ii) Failed to particularise the terms of the contract (whether express or implied) that is said to have specified the way in which a trust was allegedly conferred on the applicant as stated in the two amended charges (no. 1).

[11] The applicant through his solicitors had filed a notice of application dated 2 July 2019 ("NOA No. 2") and an affidavit-in-support affirmed by the applicant on 3 July 2019 in the Magistrate's Court encompassing the same preliminary objection raised by the learned counsel on 24 July 2019.

[12] On 8 July 2019 on the date of the hearing of NOA No. 2, the learned DPP once again preferred two new amended charges on the applicant, which read:

> **Pertuduhan Pindaan Pertama**
>
> Bahawa kamu pada 16/12/2015 di Lapangan Terbang Sultan Abdul Aziz Shah, dalam daerah Petaling, di negeri Selangor yang diamanahkan dengan harta minyak iaitu minyak Jet berjumlah 20,000 liter milik syarikat Carriercorp Petroleum telah melakukan pecah amanah jenayah iaitu dengan curangnya melepaskan harta tersebut dengan melanggar apa-apa kontrak yang menetapkan cara bagaimana amanah itu perlu disempurnakan, yang nyata (atau disifatkan ada) mengenai penyempurnaan amanah itu dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 406 Kanun Keseksaan.
>
> **Pertuduhan Pindaan Kedua**
>
> Bahawa kamu pada 18/12/2015 di Lapangan Terbang Sultan Abdul Aziz Shah, dalam daerah Petaling, di negeri Selangor yang diamanahkan dengan harta minyak iaitu minyak Jet berjumlah 16,380 liter milik syarikat Carriercorp Petroleum telah melakukan pecah amanah jenayah iaitu dengan curangnya melepaskan harta tersebut dengan melanggar apa-apa kontrak yang menetapkan cara bagaimana amanah itu perlu disempurnakan, yang nyata (atau disifatkan ada) mengenai penyempurnaan amanah itu dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 406 Kanun Keseksaan.

(Hereinafter referred to collectively as "two amended charges (no. 2)")

[13] On 8 July 2019, counsel for the applicant reiterated the objections contained in NOA No. 2 towards the two amended charges (no. 2) on the basis of non-compliance with s. 154 CPC, namely that the two amended charges (no. 2):

(i) Failed to identify the contract that is said to have specified the way in which a trust was allegedly conferred on the applicant as stated in the two amended charges (no. 1); and

(ii) Failed to particularise the terms of the contract (whether express or implied) that is said to have specified the way in which a trust was allegedly conferred on the applicant as stated in the two amended charges (no. 1).

[14] Counsel for the applicant applied for the following orders against the two amended charges (no. 2):

1. Bahawa pihak Pendakwa Raya di dalam kes *Pendakwa Raya lwn. Anuar bin Ghazali* (Kes No.: BB-M4-83-1139-4/19) diperintahkan, sebelum permulaan perbicaraan, untuk meminda (Dua Pertuduhan Pindaan Kedua) yang dikemukakan dengan mengenal pasti kontrak yang dikatakan telah menetapkan cara bagaimana amanah yang kononnya telah diberikan kepada Pemohon sepertimana yang dinyatakan dalam (Dua Pertuduhan Pindaan Kedua) perlu disempurnakan;

2. Bahawa pihak Pendakwa Raya di dalam kes *Pendakwa Raya lwn. Anuar bin Ghazali* (Kes No.: BB-M4-83-1139-4/19) diperintahkan, sebelum permulaan perbicaraan, untuk meminda (Dua Pertuduhan Pindaan Kedua) yang dikemukakan dengan memperbutirkan terma-terma kontrak (sama ada yang nyata atau tersirat) yang dikatakan telah menetapkan cara bagaimana amanah yang kononnya telah diberikan kepada Pemohon sepertimana yang dinyatakan dalam (Dua Pertuduhan Pindaan Kedua) perlu disempurnakan;

3. Bahawa sekiranya pihak Pendakwa Raya gagal untuk mematuhi perintah di perenggan (1) dan (2) di atas dalam masa yang ditetapkan oleh Mahkamah Yang Mulia ini, (Dua Pertuduhan Pindaan Kedua) yang dikemukakan terhadap Pemohon di dalam kes *Pendakwa Raya lwn. Anuar bin Ghazali* (Kes No: BB-M4-83-1139-4/19) dibatalkan dan/atau digantung atas dasar penyalahgunaan proses Mahkamah Yang Mulia ini; dan

4. Lain-lain relif yang difikirkan patut dan sesuai oleh Mahkamah Yang Mulia ini.

[15] After hearing submissions from both parties, the learned Magistrate dismissed the applicant's application and set trial dates on 6 to 8 January 2019 for the two amended charges (no. 2).

[16] The applicant then filed a revision application against the learned Magistrate's decision on 8 July 2019 ("revision application").

[17] A notice of motion dated 15 August 2019 (Criminal Application No: BA-44-232-08-2019) was filed in which the following orders were sought:

1. Bahawa perintah Puan Majistret di Mahkamah Majistret Jenayah 4 di Petaling Jaya dalam kes *Pendakwa Raya lwn. Anuar bin Ghazali* (Perbicaraan Jenayah No.: BB-M4-83-1139-4/19) bertarikh 8hb Julai 2019 yang menolak permohonan Pemohon di bawah seksyen 154 untuk mengarahkan pihak Pendakwaan untuk meminda pertuduhan-pertuduhan pindaan kedua yang dikemukakan terhadap Pemohon pada hari yang sama diketepikan dan dibatalkan;

2. Bahawa pihak Pendakwa Raya dalam kes *Pendakwa Raya lwn. Anuar bin Ghazali* (Perbicaraan Jenayah No: BB-M4-83-1139-4/19) diperintahkan, sebelum permulaan perbicaraan dengan pemanggilan saksi-saksi, untuk meminda pertuduhan-pertuduhan pindaan kedua

yang dikemukakan terhadap Pemohon dengan mengenal pasti perjanjian kontrak yang Pemohon dikatakan telah melanggar selaras dengan peruntukkan di bawah seksyen 154 Kanun Prosedur Jenayah;

3. Bahawa pihak Pendakwa Raya di dalam kes *Pendakwa Raya lwn. Anuar bin Ghazali* (Kes No.: BB-M4-83-1139-4/19) diperintahkan, sebelum permulaan perbicaraan dengan pemanggilan saksi-saksi, untuk meminda pertuduhan-pertuduhan pindaan kedua yang dikemukakan dengan memperbutirkan peruntukkan-peruntukkan kontrak (sama ada yang nyata atau disifatkan ada) yang Pemohon dikatakan telah melanggar selaras dengan peruntukkan di bawah seksyen 154 Kanun Prosedur Jenayah;

4. Bahawa sekiranya pihak Pendakwa Raya gagal perintah di perenggan-perenggan (2) dan (3) di atas dalam masa yang ditetapkan, pertuduhan-pertuduhan pindaan kedua yang dikemukakan dalam kes *Pendakwa Raya lwn. Anuar bin Ghazali* (Perbicaraan Jenayah No.: BB-M4-83-1139-4/19) dibatalkan dan/atau digantung atas dasar salah guna proses Mahkamah; dan

5. Lain-lain relif yang difikirkan patut dan suai oleh Mahkamah Yang Mulia ini.

[18] On 16 December 2019 in Criminal High Court in Shah Alam, the learned High Court Judge rejected the revision application after hearing submissions of both parties.

[19] The learned High Court Judge dismissed the revision application on the grounds that:

(i) the court does not have power/jurisdiction to order the prosecution to amend the two amended charges (no. 2) before the start of the trial; and

(ii) that s. 156 CPC ties the court's hands unless there is reason to believe that the applicant was misled by the two amended charges (no. 2).

Summary Of The Applicant's Contentions

[20] In seeking for this court to strike out the two amended charges (no. 2) (hereinafter referred to as 'the charges') against him, the applicant firstly contends that the learned High Court Judge did not make any findings as to whether the charges were defective in his judgment and as such the doctrine of *res judicata* does not apply herein.

[21] Secondly, it is submitted that the High Court has the inherent power and/or jurisdiction to set aside or strike out proceedings that are an abuse of process.

[22] Thirdly, there was a failure on the part of the respondent to comply with s. 154 CPC as the charges against the applicant do not contain such particulars of the manner in which the alleged offences were said to have

A been committed ie, the charges do not specify the contract which the applicant is alleged to have breached and the terms of the contract which he is alleged to have breached.

[23] Fourthly, it is the applicant's submission that his right to a fair trial and quality of life protected by art. 5(1) of the Federal Constitution ("FC") B has been infringed by the Public Prosecutor's non-compliance with s. 154 CPC. The applicant contends that he does not have sufficient notice of the matter with which he is charged and his quality of life is thereby diminished by the unlawful charges as he is now forced to pay for legal fees and bail, attend court, attend meetings with counsel, and/or constantly worry about C the charges against him, thus affecting his mental health.

[24] Fifthly, the applicant submits that when a proceeding encroaches on an accused's fundamental rights, the proceeding is rendered null and void and that in determining whether a proceeding violates an accused's fundamental rights, the court must examine the potential, not the actual, consequences D that will flow from the failure to comply with a procedural requirement. It is submitted that the test is not to wait and see whether an accused has in fact been prejudiced. The non-compliance with s. 154 CPC renders the charge defective and cannot be cured so long as the objection is raised before the commencement of trial. The applicant contends that in any event, he has E suffered prejudice as a result of the non-compliance with s. 154 CPC and to allow him to undergo a trial in breach of his constitutional rights would be an abuse of process.

[25] Lastly, it is argued that s. 156 CPC cannot cure the procedural errors *re* the framing of a charge because:

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(i) s. 156 CPC does not cure challenges raised at the outset of proceedings that the trial is a nullity;

(ii) s. 156 CPC only applies with respect to or after any finding, judgment sentence or order passed or made by a court; or it would be an G infringement of the court's separation of powers if s. 156 CPC can estop a court from striking out proceedings that are an abuse of process

[26] Learned counsel for the applicant submits that s. 156 CPC must be read together with s. 422 CPC as a saving mechanism that only comes into operation after the trial judge has made a finding, judgment, sentence, or H order, or at the earliest when the trial has reached a stage when the court has had sufficient material to determine whether an accused has been misled. It was argued that it would be wrong and unconstitutional to use the statutory mechanism of s. 156 CPC in an attempt to cure proceedings which are an abuse of process and thereby a nullity *ab initio*.

I **[27]** In the alternative, learned counsel for the applicant argued that if s. 156 CPC by proper interpretation applies "at any stage of the case" so as to cover the stage of the proceedings before the trial commences by the calling

of the first witness, this would encroach upon the judicial power of the court, in that it compels a court of law to hold a trial in breach of an accused's constitutional rights which is inconsistent with the doctrine of separation of powers as it impinges upon the court's powers embedded in art. 121 of the FC and will infringe the applicant's constitutional rights.

Summary Of The Respondent's Submission

[28] In reply to the applicant's averments, the respondent in their affidavit-in-reply avers that the present application is irregular and an abuse of process of the law as the matters raised by the applicant in his affidavit in support herein have been raised in the revision application wherein the learned High Court Judge upheld the decision of the learned Magistrate in dismissing the applicant's application and directed for the trial to be proceeded with in the lower court.

[29] It is the respondent's contention that the applicant ought to have appeal against the learned High Court Judge's decision. It is further averred that the court has no power to direct the Public Prosecutor to amend the charges before the commencement of the trial as the evidence has yet to be tendered before the court.

Findings

[30] The present application gives rise to two separate matters/issues. The first is the issue of *res judicata* and secondly, whether the High Court can exercise its inherent power and/or jurisdiction to set aside or strike out criminal proceedings on the ground of failure to comply with the provision of the CPC ie, s. 154.

The Res Judicata Issue

[31] On this issue, it is apposite to be reminded of the basis of the applicant's grievance against the charges preferred against him by the respondent. The applicant's main objection relates to the fact that he is put in a quandary since the charges and the amendments thereafter failed to identify specifically the contract and the terms therein in which a trust was allegedly conferred on him and how he is said to have breached the trust. Pursuant to the final version of the amended charges, without the objectionable parts being amended and the charges still read as *"dengan curangnya melepaskan harta tersebut dengan melanggar apa-apa kontrak yang menetapkan cara bagaimana amanah itu perlu disempurnakan, yang nyata (atau disifatkan ada) mengenai penyempurnaan amanah itu"* (the highlighted being the objectionable part by the applicant) the applicant by way of the revision application seeks for the High Court to set aside the learned Magistrate's decision and again for the prosecution be ordered to amend the charges by identifying the contract and the terms of which the applicant are said to have breached. The objection raised was made pursuant to s. 154 CPC.

[32] The applicant avers at paras. 19 and 20 in his supporting affidavit that in dismissing the revision application, the learned High Court Judge in his oral judgment gave the reasons as follows:

(i) that the court does not have power/jurisdiction to order the prosecution to amend the charges before the start of the trial; and

(ii) s. 156 CPC ties the court's hands unless there is reason to believe that the applicant was misled by the charges

[33] The prosecution does not refute the applicant's averments and since no grounds of judgment is furnished, it can be conclusively said that the two grounds stated in the above were the only points given by the learned High Court Judge in dismissing the revision application. It is therefore uncontroverted and clear that from the oral judgment of the learned High Court Judge, no specific finding was made in relation to s. 154 CPC of which is the cornerstone of the application before this court.

[34] It is the prosecution's contention that the application herein is an abuse of the court's process as the matters raised by the applicant in his affidavit in support were raised in the High Court on 13 December 2019 in the revision application. This court finds that although the applicant's revision application is for the prosecution to amend the charges, the basis of which is that the charges are in contravention of s. 154 CPC, the oral judgment of the learned High Court Judge is silent as to whether the charges in fact and law contravened the same section. This court agrees with the applicant's learned counsel's submission that if indeed there is a finding that there is no contravention of s. 154 CPC in the revision application, then the second point made by the learned High Court Judge is rendered unnecessary. The fact that the learned High Court Judge came to his second reasoning in that the court has no power to order the prosecution to amend the charges, opens a higher probability of speculation that the learned judge might have found the charges are in contravention of s. 154 CPC but the court does not have the power to order the prosecution to amend the charges. However, this court cannot enter into any speculation that the learned High Court Judge had indeed made the finding that the charges contravene s. 154 CPC or otherwise. There is therefore no evidence of *res judicata* before this court.

[35] To stretch further on this matter, if at all the contravention or otherwise of s. 154 was decided by the learned High Court Judge, there is the species of issue estoppel arising herein. The question is whether issue estoppel is applicable in criminal matters. The answer can be found in *Archbold Criminal Pleading, Evidence and Practice 2009* where it is stated that the civil doctrine of issue estoppel has no application to the criminal law. The learned author at paras. 4-155 stated the followings:

(10) Issue estoppel

Principle

4-157 (a)The civil doctrine of issue estoppel, as distinct from that of *res judicata*, has no application to the criminal law: *DPP v. Humphrys* [1977] AC 1, HL, not following certain *dicta* in *Connelly v. DPP* [1964] AC 1254, HL

(b) The doctrine of *res judicata* does apply to the criminal law in the form of the *maxim nemo debet bis vexari pro eadem causa*, or *nemo debet bis puniri pro uno delicto* – "no one should be twice put in jeopardy of being convicted and punished for the same offence" (the rule against "double jeopardy"). The pleas of *autrefois* convict and acquit are founded on these maxims.

(c) In certain cases, an attempt to raise again an issue that has, in effect, been decided in a previous criminal trial will amount to an abuse of process and may be stayed, even though it does not come within principle (b): *ibid.*, per Lord Hailsham at p. 41, *Salmon* at p. 46, and *Edmund-Davies* at pp. 52,53. Lord Dilhorne, at pp. 22,23, dissented on this point but said that one remedy would be for the DPP to take over the prosecution and (by implication) to offer no evidence. Lord Fraser expressed no opinion on the point as it had not been argued. (See *ante* & 4-48 *et seq*. as to abuse of process generally)

In *DPP v. Humphrys*, H had been acquitted of driving whilst disqualified; the only issue being whether a constable was correct in identifying H as the driver on a particular day. At a subsequent trial for perjury in respect of his evidence that he had not driven at all during the year in question, the constable was allowed to give the same evidence, and further evidence was called from other witness who had seen H driving on various occasions during that year. Held, the facts disclosed neither a breach of the double jeopardy rule, nor an abuse of process.

[36] In *Director of Public Prosecutions v. Humphrys* [1976] 2 All ER HL 497, Lord Hailsham had succinctly elucidated the law on issue estoppel in criminal matters as follows:

In spite of the use of the words "issue estoppel" as a convenient label, I attach the same meaning to the speeches of Lord Hodson and Lord Pearce. The doctrine in criminal proceedings is aimed at the need to prevent double jeopardy and not at the need to effect finality in litigation. It is thus aimed at verdicts rather than issues, and through issues may sometimes be isolated and examined to see whether there has in fact been a danger of inconsistent verdicts and thus a double jeopardy (and where there is the second prosecution is prohibited), where there is no such double jeopardy involved in the case the prosecution is not prohibited from adducing evidence or making assertions the incidental effect of which is to cast doubt on a previous verdict.

…

> Since this opinion is already long I venture to summarise it as follows. (1) *The doctrine of issue estoppel as it has been developed in civil proceedings is not applicable to criminal proceedings.* It follows that the decision in *R v. Hogan* was wrong and should not be followed. The decision in *HM Advocate v. Cairns* was correct and applicable in England. (2) Although the civil doctrine of issue estoppel as it has been developed in civil proceedings is not applicable to criminal proceedings, there is a doctrine applicable to criminal proceedings which is in some ways analogous to issue estoppel, and has sometimes been describe by that name. However, (3) *the civil doctrine is based on the necessity for finality between private litigants, whereas doctrine in criminal proceedings is based on prohibition of double jeopardy i.e. the maxim nemo debet bis vexari pro eadem causa.* It follows (4) that whereas the civil doctrine is equally applicable to either of the two civil parties, the criminal doctrine is available to the accused but not to the Crown. (5) Whereas the civil doctrine applies to all cases where an individual issue can be isolated and identified as determined, *the criminal doctrine is not so limited but is primarily concerned with verdicts, and applies to verdicts which are either in form or in substance inconsistent.* (emphasis added)

[37] It can be understood from the long distillation of Lord Hailsham in the above case that any species of issue estoppel in criminal proceedings must be a kind that affects verdicts meaning, guilty or acquittal because criminal law is aimed at consistency of verdict rather than finality of issues. In the context of the present application, it is therefore clear that the issue of whether the charges preferred against the applicant are in breach of s. 154 CPC is not an issue envisaged by the House of Lords in *DPP v. Humphrys* (*supra*) as the issue does not affect verdict.

[38] Returning to the revision application, it is the finding of this court that there is no evidence to show that the learned judge had made any ruling or decision on the issue of s. 154 CPC and even if he did, issue estoppel does not arise herein as it does not affect verdict.

The Inherent Power And/Or Jurisdiction Of The High Court To Set Aside Or Strike Out Criminal Proceedings On The Ground Of Failure To Comply With The Provision Of The CPC ie, Section 154 CPC

[39] The Supreme Court in *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 had opined that the High Court is vested with the inherent power to strike out proceedings that are an abuse of process. The then Supreme Court through the judgment of Abdul Hamid Omar LP (as he then was) at p. 192 of the report had stated in the following terms:

> Our considered opinion is that the English doctrine of inherent jurisdiction is hardly applicable in subordinate Courts **but the High Court may invoke such prerogative powers in rare instances where it is right to do justice to the accused** …

> **In matters like criminal law of a purely domestic nature, our view is that the Court will only exercise inherent powers where there is miscarriage of justice.** The Courts must be careful that the decision is not in conflict with the intention of the Legislature as indicated in statutory powers … (emphasis added)

[40] The English jurisprudence of inherent power and/or jurisdiction of the superior courts to strike out any proceeding on the ground of abuse of process can be traced back to the English common law and the rationale can be gleaned from the *dicta* of Lord Morris of Borth-Y-Gest in *Connelly v. DPP* [1964] 2 All ER 401 at p. 409 of the report as follows:

> I agree with what was said by Lord Goddard CJ in *R v. Chairman, County of London Quarter Sessions, Ex parte Downes* ([1953] 2 All ER 750 at p 751; [1954] 1 QB 1 at p 6), that *once an indictment is before the court the accused must be arraigned and tried thereon unless (on a motion to quash or demurrer pleaded) the indictment is held to be defective in substance or form and is not amended* …
>
> *There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction.* A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process …
>
> The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice.
>
> (emphasis added)

[41] In *DPP v. Humphrys* (*supra*), the House of Lords by majority after considering the judgments of *Connelly* (*supra*), *Mills v. Cooper* [1967] 2 All ER 100 and *Metropolitan Bank Ltd v. Pooley* [1885] 10 App Cas 210 at 220, agreed that the courts have the power and discretion to decline to hear proceedings that are vexatious and oppressive to prevent an abuse of process of the court. Lord Edward-Davies in that case at p. 533 of the report stated as follows:

> Notwithstanding certain of my observations in delivering the judgment of the Court of Criminal Appeal in *Connelly* ([1963] 3 All ER 510 at 518, 519, [1964] AC at 1276, 1277), I am now satisfied that, in the words of Lord Parker CJ in *Mills v. Cooper* ([1967] 2 All ER at 104, [1967] 2 QB at 467), '*every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court*'.

[42] Apart from the decision in *Karpal Singh v. PP* (*supra*), the recognition of the inherent power of the courts to strike out charges on the basis of oppression and abuse of process has been repeated in several cases. Speaking on behalf of the Federal Court, Raus Sharif PCA (as he then was) in *Ahmad Zubair Hj Murshid v. PP* [2014] 9 CLJ 289 had elucidated the principle of inherent power as follows:

[25] In the present case both the High Court and the Court of Appeal held that the High Court has inherent power to set aside and quash or stay the charges permanently against the appellant. Historically the doctrine of inherent power which allowed the High Court to prevent an oppressive and *mala fide* prosecution, abuse of process and to do wrong in the administration of justice has its origin in the English common law. Such doctrine can be traced in the following cases:

(a) *Metropolitan Bank Ltd & Anor v. Poolev* [1881-1885] All ER Rep 949, where it was held:

> There is an inherent power in every court of justice to stay a manifestly vexatious suit and to prevent vexatious suit and so protect itself from an abuse of its procedure ...

(b) In *Connelly v. Deputy Public Prosecutor* [1964] 2 All ER 401 at p. 409, Lord Morris of Borth-Y-Gest said:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.
>
> The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice.

(c) In *Mills v. Cooper* [1967] 2 All ER 100, at p. 104 Lord Parker CJ said:

> Every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court...

[26] Although we accept the foregoing principles stated above as the correct statement of the law, we must caution ourselves that the inherent powers of the court must be exercised in exceptional circumstances to prevent undue oppression and abuse of the process of the court. It should also be noted that the inherent jurisdiction of the court springs not from legislation but from the nature and constitution of the court as a dispenser of justice! (see: *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal* [2013] 4 CLJ 901; [2013] 4 MLJ 35). As such we may hasten to add that the inherent jurisdiction of the court is therefore not as wide as it seems to be. Much depends on the facts and circumstances and clearly the court cannot exercise its inherent jurisdiction in respect of any matter covered by specific provisions of the law or if its exercise would infringe any specific provisions of the law. In this aspect it is apposite that we refer to the decision of the Supreme Court of India in the case of *Arun Shankar Shukla v. State of UP* [1999] Cr LJ 3964. The Supreme Court in

addressing the inherent powers of the High Court which is statutorily envisaged under s. 482 of the Indian Criminal Procedure Code observed that:

> It is true that under s. 482 of the Code, the High Court has inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent the abuse of process of any Court or otherwise to secure the ends of justice. *But the expression "abuse of the process of law" or "to secure the ends of justice" do not confer unlimited jurisdiction on the High Court and the alleged abuse of the process of law or the ends of justice could only be secured in accordance with law including procedural law and not otherwise. Further, inherent powers are in the nature of extraordinary powers to be used sparingly for achieving the object mentioned in s. 482 of the Code in cases where there is no express provisions empowering the High Court to achieve the said object. It is well neigh settled that inherent powers is not to be invoked in respect of any matter covered by specific provisions of the Code or if its exercise would infringe any specific provisions of the Code.*
>
> (emphasis added)

[27] Closer to home the above English common law doctrine of inherent jurisdiction found its way and adopted by the Malaysian Courts in the landmark case of the then Supreme Court case of *Karpal Singh & Anor v. PP* (*supra*) which as stated earlier prompted the appellant in this case to file the motion before the High Court. The issue now is whether such doctrine of inherent jurisdiction and thus inherent power can be exercised to strike out the charges and to have the appellant acquitted and discharged on those charges.

[28] In this regard it is appropriate to recall the reminder by the Supreme Court in *Karpal Singh v. PP* (*supra*) of the constitutional consequences of relying on the English concept of common law (one of which is the concept of inherent jurisdiction of the courts).

[43] Bearing in mind that the inherent power/jurisdiction of the courts is not as wide as it seems to be, as stated by the Federal Court in *Ahmad Zubair Hj Murshid v. PP* (*supra*) and that it is to be used sparingly, as stated by the Indian Supreme Court in *Arun Shankar Shukla v. State of UP* (*supra*) as well as the unfettered discretion of the Attorney General in preferring charges in criminal proceedings, this court will now consider whether there is failure on the part of the respondent to comply with s. 154 CPC warranting the court to exercise its inherent jurisdiction to strike out or stay *in limine* the trial against the applicant in the Magistrate's Court.

[44] It is pertinent to note that under s. 154 CPC it is mandatory to state in the charge the manner in which the alleged offence was committed as will be sufficient for that purpose. Section 154 CPC reads as follows:

When manner of committing offence must be stated

154. When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[45] The applicant was charged on two accounts of committing criminal breach of trust *simpliciter* under s. 405 PC which states:

Criminal breach of trust

405. Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

[46] It is therefore clear that s. 405 PC prescribes five limbs the manner in which an offence of criminal breach of trust may be committed by an accused person which includes any of the followings:

(i) Dishonest misappropriation of property;

(ii) Dishonest conversion of property to own use;

(iii) Dishonest use or disposal of property in violation of any direction of law prescribing the manner in which such trust is to be discharged; or

(iv) Dishonest use or disposal of property in violation of any legal contract (express or implied) which has been made touching the discharge of such trust.

[47] The fifth category is willfully suffers any other persons to do any of the four categories in the above.

[48] The Federal Court in *PP v. Yeoh Teck Chye* [1981] 1 LNS 93 had recognised that the manner in which an accused person is alleged to have committed an offence of criminal breach of trust is a legal element of the offence. Therefore, it is the requirement of the law that a person charged with criminal breach of trust must be afforded with particulars of the manner in which he committed the offence as it constitutes an essential ingredient of the same.

[49] In *PP v. Teoh Choon Teck* [1962] 1 LNS 141; [1963] 1 MLJ 34 the High Court had laid down the proposition that where a penal provision provides alternative ways in which the offence may be committed, then the specific mode of commission of the offence must be specified. The proposition was elucidated by Hepworth J as follows:

> If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may (*Lim Beh & Ors v. Opium Farmer* [1982] 3 KY 10). *A charge should be so drawn that the accused should know exactly and with particularity the case which he has to meet and he should not be left guessing as to which of a number of alternatives he is alleged to have offended against.* A charge, and especially a charge in a complicated case, should be accompanied by particulars of the acts complained of as constituting the crime charged when the mere mention of the time, place, persons and crime are insufficient to explain by what means the crime was committed.
>
> (emphasis added)

[50] In *Hj Maamor Hj Abdul Manap v. PP* [2003] 1 CLJ 370, the accused was charged for criminal breach of trust. The charge so preferred against the accused did not state as to which limb under s. 405 PC the offence is said to have been committed. Upon finding that the first two limbs relating to misappropriation and conversion were inapplicable to the facts of the case, the High Court went on to consider the applicability of the last two limbs ie, use or disposal of property in violation of a direction of law or legal contract. In applying the *ratio* in *Cheam Tat Peng v. PP* [1996] 1 SLR 541 which held that there must be a "degree of specificity" in the direction of law in question, the court in *Hj Maamor* (*supra*) went on to find that the charge ought to have specified the particular direction or law or contract that has been breached. Augustine Paul J (as he then was) stated in the following fashion:

> In the circumstances it is my view that the prosecution had not made out a case under the first two limbs of s. 405. The remaining matter for consideration is whether the accused had dishonestly used or disposed of the sums of money in violation of any direction of law prescribing the mode in which the money is to be used or of any legal contract, express or implied, which he has made touching the use of such sums as provided by the third limb of s. 405. This is the appropriate limb under which the accused ought to have been charged if the manner in which he had used the funds of KSB was in breach of his obligation to KSB to use its funds in a particular way.
>
> …
>
> In *Cheam Tat Pang v. PP* [1996] 1 SLR 541 it was held that *the word "mode" in the third limb in s. 405 connotes that there must be a degree of specificity in the direction of law in question* …
>
> Section 132(1) cannot therefore be construed as a "direction of law" for the purpose of the third limb of s. 405. With regard to the contractual obligation of the accused it is true that there was no Board Resolution of KSB to authorise him to make the loans that he had made. In the absence of such a resolution the disbursement of the sums of moneys involved as loans by the accused may only amount to an offence under

A s. 133A of the Companies Act 1965. *However, it must be noted that if the case of the prosecution is to fall under the third limb of s. 405 the charge ought to have specified the particular direction of law or contract that has been breached.*

(emphasis added)

[51] It is therefore clear from the above authorities that a charge for B criminal breach of trust must specify the particular direction or law or contract that has been breached, which is what the applicant was seeking in the revision application. Particularisation under s. 154 CPC is required so as to give notice to the applicant for him to know exactly what he is answering to. In doing so, only then the applicant would be able to instruct C his counsel in preparing for his defence to contradict and rebut the evidence that is to be adduced. The question is whether the applicant herein is able to do all that is required for him to raise reasonable doubt on the prosecution's case and to give instructions regarding any representation letters to the Public Prosecutor.

D **[52]** The uncontroverted facts by the applicant *via* his supporting affidavit state that upon scrutiny of the charges and after being served with the relevant documents pursuant to s. 51A CPC, he is deprived of a sufficient notice to answer the charges preferred against him as the charges failed to identify and particularise the contract and the terms therein of which he is alleged to have E breached. The applicant further asserts that the only documents surrendered pursuant to s. 51A of the CPC capable of amounting to a contract are the purchase orders from the company's customers. However, the applicant affirmed that he is unable to know, with any degree of certainty, whether or not these purchase orders are the contracts referred to in the charges. According to the applicant' this is particularly significant given that the F company's practice has regularly been to purchase fuel from its suppliers without relying on any purchase orders from any of its customers and the purchases are made based on the stock inventory and/or the fuel market price at any point of time. The applicant avers that he is left guessing as to which other legal contract exists that establish the requisite element of G entrustment, as well as the manner in which he is contractually bound to discharge that trust. It is further asserted that given the regular practice of the company which operates independent of any legal contract, particulars regarding the specific legal contract, as well as its relevant terms which he is alleged to have breached, is necessary to enable him to have sufficient H notice of the matter with which he is charged. That information is not readily accessible to him.

[53] Premised on the principle enunciated in the authorities cited in the above, this court finds that the two amended charges contain no specificity as to the legal contract which the appellant is alleged to have breached. It is I further found that the two amended charges failed to state the specific illegal act that the applicant has committed that tantamount to a violation of the contract. After objections were raised twice and three occasions of

amendments, all that are mentioned in the amended charges are "perjanjian kontrak, yang nyata atau disifatkan ada" which makes it ambiguous as to whether the purchase orders (provided in the s. 51A CPC documents) are in fact the contracts referred to in the amended charges.

[54] The two amended charges are therefore defective as they have failed to comply with the mandatory requirements under s. 154 CPC. In *Public Prosecutor v. Anuar bin Arshad* [1996] 1 SLR(R) 496, Yong Pung How CJ of Singapore (as he then was) held as follows:

> 24 In the course of examining the record, I noted that the charge framed in the present case had simply alleged that the respondent had committed criminal breach of trust. It contained no indication as to which of the five possible types of acts of criminal breach of trust (see s. 405 of the Penal Code) the respondent was alleged to have committed. Moreover, the charge did not specify whether the *mens rea* alleged was that of "dishonesty", which relates to the fifth act (sufferance of another person to commit one of the first four acts contemplated under s. 405).
>
> 25 *As a general rule, it cannot be satisfactory for the Prosecution to prefer charges which lack clarity and specificity. The Defence should be entitled to know the Prosecution's allegations with a reasonable degree of particularity, and not left to guess what these allegations will be. This is especially so where the offence is one of criminal breach of trust, which can take the form of five different species of actus reus.* (emphasis added)

[55] Having found the two amended charges defective for non-compliance with the mandatory requirements under s. 154 CPC, the next questions are, can a trial proceed in breach of s. 154 CPC and whether the applicant's constitutional rights to a fair trial pursuant to art. 5 FC have been infringed by the non-compliance.

[56] Sections 152 to 154 CPC provide for the principles on the framing of charges which state that the charge must positively and precisely state the offence; the law, and punishable section of the law; the time and date of the offence; the place and the particulars. It may be observed that the requirements of the law manifest through these provisions are to preserve and safeguard a person's right to be informed of the charge so as to enable him to mount any defence which would contradict the charge. That right is obligatory in nature as it forms part of the constitutional right to a fair trial which is expressed in art. 5 FC.

[57] Article 5(1) FC states:

> 5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

[58] In *Re Tan Boon Liat* [1977] 1 LNS 110, Lee Hun Hoe CJ (Borneo) had held that the expression "in accordance with law" appearing in art. 5(1) includes procedural law. The Federal Court in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 had further considered the expression as follows:

A [15] We next move to consider the expression "according to law" appearing in art. 5(1). It is counsel's submission that the expression "law" includes procedural law. In support he cited the judgment of Lee Hun Hoe CJ (Borneo) in *Re Tan Boon Liat* [1977] 1 LNS 110 where the learned Chief Justice held that:

B > *... in accordance with law in Article 5 of our Constitution is wide enough to cover procedure as well.* Here the point is not whether the question of procedure is more important under one Constitution than under the other. *If the expression 'in accordance with law' were to be construed as to exclude procedure then it would make nonsense of Article 5.*

C With respect we agree. It is equally our misfortune that we find ourselves in disagreement with the contrary view expressed by Suffian LP in the same case and in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia* [1969] 1 LNS 65. In our judgment what art. 5(1) strikes down is all forms of State action that deprive either life or personal liberty bearing a meaning of the widest amplitude in contravention of substantive or procedural law.

D [16] We next turn to consider the expression "law". It is defined by art. 160(2) of the Constitution as follows:

> 'Law' includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom
E > or usage having the force of law in the Federation or any part thereof.

"Common law" is defined by s. 66 of the Consolidated Interpretation Acts of 1948 & 1967 as follows:

> 'common law' means the common law of England

F We resort to s. 66 in Part II of the Consolidated Acts as it expressly states that it applies to "every written law as hereinafter defined, and in all public documents enacted, made or issued before or after 31 January 1948". Since the Constitution is a written law that came into force in 1957, that is to say, after 31 January 1948, it is Part II that must be utilised to
G interpret the supreme law. The rule of law forms part and parcel of the common law of England. And the rules of natural justice which form part of the wider concept of "procedural irregularity" formulated by Lord Diplock in Council of *Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 are an integral part of the rule of law. Accordingly, the rule of law in all its facets and dimensions is included in the expression "law"
H wherever used in the Constitution. Hence, the expression "law" in art. 5(1) includes written law and the common law of England, that is to say the rule of law and all its integral components and in both its procedural and substantive dimensions. For, it is now settled that the rule of law has both procedural and substantive dimensions. See, *Pierson v. Secretary of State for the Home Department* [1997] 3 All ER 577, where at p. 606, Lord
I Steyn said: "The rule of law in its wider sense has procedural and substantive effect."

[17] We also find support for the view we have expressed from the judgment of Lord Diplock in *Ong Ah Chuan v. Public Prosecutor* [1980] 1 LNS 181; [1981] 1 MLJ 64, where, when dealing with arts. 9 and 12 of the Singapore Constitution which are identical to arts. 5 and 8 respectively he said:

> In a constitution founded on the *Westminster* model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules.

It is clear from this passage that the rules of natural justice, which is the procedural aspect of the rule of law, is an integral part of arts. 5(1) and 8(1). In short, procedural fairness is incorporated in these two articles.

[18] Drawing the threads together, it is clear from the authorities that *it is a fundamental right guaranteed by art. 5(1) that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with State action that is fair both in point of procedure and substance.* Whether an impugned State action is substantively or procedurally fair must depend on the fact pattern of each case. *However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused is entitled to an acquittal.* Whether there has been a fair trial by an impartial tribunal or a just decision depends on the facts of each case. While upon the subject under discussion we would refer with approval to the judgment of Edgar Joseph Jr J (as he then was) in *Public Prosecutor v. Choo Chuan Wang* [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329, where he held that:

> Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial Court established by law. It follows that if an accused person can establish a breach of this right then, in the words of Sandhawalia, CJ in *Madheshwardhari Singh v. The State (ibid) (Madheshwardhari Singh and Anor. v. State of Bihar* [1986] AIR (Pat) 324), he would be entitled to an unconditional release and the charges levelled against him would fall to the ground.
>
> (emphasis added)

[59] It is the applicant's contention that his right to be informed of the nature of the allegation levelled against him is a species of a right to a fair trial. The contention is put beyond argument in *R v. Rackham* [1997] 2 Cr. App. R.222 where the English Court of Appeal had held that not only does the court have the inherent power to order the prosecution to provide the particularisation such as would meet the rigours of the demands of fair trial, but also that the court possesses an inherent power to quash any conviction where it is found that the accused's right to a fair trial is at risk. The English Court of Appeal stated as follows:

> On the other hand, it can validly be said that *although the prosecution are not obliged in every case to give detailed particulars of times and places, at least they should be obliged to specify the type of conduct which it is alleged constitutes the particular offence which is the subject of a count in the indictment. Otherwise, not to do so would leave the defendant at a disadvantage in not knowing what it was he was supposed to have done and being unable to marshal his mind on more important evidence to counter those allegations. It is as if the prosecution merely said: 'Well, let us see the evidence of the complainant, see how it turns out, and then decide afterwards.' That clearly is impermissible.* The defendant is, at least, entitled to know the conduct alleged.
>
> (emphasis added)

[60] The Court of Appeal in that case through the judgment of Ian Kennedy J further held:

> In our judgment, it is not necessary to look for authority for the proposition that an indictment should be so drawn or exemplified that a defendant will know with as much particularity as the circumstances of the case will admit what is the case that he must meet, so that he can, in the words of Rougier J, "Marshal his mind on more important evidence to counter those allegations."
>
> "… a difficulty in being precise in every respect is not a reason not to be precise when one can"
>
> The careful use of the power to allow an amendment should ensure that there is fairness in either direction.
>
> It is our conclusion that the learned judge was in error in not acceding to the request for the better identification of what was relied upon in these counts. The persisting uncertainty was such that, in our judgment, the convictions on counts 1 and 1a, 3 and 3a and 5 and 5a are unsafe. Accordingly we quash those convictions.

[61] The case of *Tan Peng Ann v. PP* [1949] Supp MLJ 10 is also brought to this court's attention where Thompson J in quoting Beckett J in the Indian case of *Kanwar Sain v. The Crown* (1938) ILR 19 (Lahore) 662 had held that:

> … It is necessary that the representation should be mentioned in the charge, so that the accused may have an opportunity of saying either that he never made such representation, or that the representation was not in fact false, or that it was not in consequence of this representation that the goods were obtained.

[62] It is therefore clear that the applicant's right to be informed manifested in ss. 153 and 154 CPC not only is a constitutional protected right but is a right which must be given at the very start of the indictment against him which cannot be delayed until the end of the trial to see whether the accused had in fact been prejudiced. The applicant cannot be forced to go through a criminal proceeding which disregards or is inconsistent with the requirement of the law ie, s. 154 CPC. It would tantamount to an abuse of process and would diminish the applicant's quality of life which is a facet of the right protected by art. 5(1) FC. In this regard, the Court of Appeal through the judgment of Gopal Sri Ram JCA (as he then was) in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771, had expressed the importance in interpreting a living document like the Federal Constitution as follows:

> Now it is true that the Federal Constitution, unlike the Indian Constitution, does not contain any Directive Principles of State Policy. Nevertheless, it is plain from the copious and continuous stream of beneficial legislation that is presented at almost every sitting of Parliament and from the voluminous subsidiary legislation that is promulgated periodically, that the elected Government is set on improving the lot of the common man. Almost on a daily basis we see regulations being made to better the living and working conditions of our labour force. There are ceaseless and untiring efforts by the elected Government, through its several agencies, to provide basic amenities and to improve the quality of life of the masses. Steps are being constantly taken to guard against any deterioration in the quality of the environment in which the populace live and work. Indeed, it is the declared policy of the Government to provide housing, water, electricity and communication systems to the far flung areas of our country. And one can plainly see the ceaseless exertions on the part of the elected Government to achieve the targeted policy.
>
> In my judgment, the Courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of Constitutional interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such as objective may only be achieved if the expression "life" in Article 5(1) is given a broad and liberal meaning.
>
> *Adopting the approach that commends itself to me, I have reached the conclusion that the expression "life" appearing in Article 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment. For the purposes of this case, it encompasses the right to continue in public service subject to removal for good cause by resort to a fair procedure.* (emphasis added)

[63] The applicant has averred that his quality of life has been diminished by the unlawful charges because he is now forced to:

(i) Pay for legal fees;

(ii) Pay for bail;

(iii) Frequently attend court for every mention, case management, trial and hearing date;

(iv) Frequently attend meetings with counsel in attempt to determine the matter with which he is charged and his defence;

(v) Constantly worry about the matter with which he is charged and his defence which might result in his being sentenced to imprisonment, thereby affecting his mental health

[64] The applicant's averments are justified as there is in existence procedural unfairness that had jeopardised the applicant's quality of life. It is of the considered view that to allow the trial to proceed with charges that defy the law and the applicant's right to a fair trial which is deeply embedded in art. 5 FC would be a blatant abuse of process.

[65] Having found the two amended charges defective for non-compliance with s. 154 CPC and that the applicant's constitutional rights to a fair trial pursuant to art. 5 FC have been infringed by the non-compliance, the following question is whether a procedural non-compliance can render a proceeding null and void?

[66] The test to be applied as to the effect of the infringement of a statutory provision especially the Constitution can be gleaned from the judgment of the Court of Appeal in *Tan Tek Seng* (*supra*) where the Court of Appeal expounded as follows:

> When the Constitutionality of State action; be it legislative (which is not the case here) or administrative; is called into question on the ground that it infringes a fundamental right, the test to be applied is whether that action directly affects the fundamental rights guaranteed by the Federal Constitution or that its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory. This was laid down by the Supreme Court in its landmark decision in *Dewan Undangan Negeri Kelantan & Anor. v. Nordin bin Salleh & Anor.* [1992] 1 MLJ 697. I need cite only the following passage (at p. 712) from the principal judgment delivered by Abdul Hamid, LP in that case:
>
> In so holding, his Lordship [the reference here is to Dr. Anand J in *Mian Bashir Ahmad & Ors. v. The State* AIR 1982 J & K 26 relied upon the judgment of the Supreme Court of India in *Smt Maneka Gandhi v. Union of India* AIR 1978 SC 597 at pp. 632-633 where the entire case law on the point was considered, and where their Lordships explained, that the word 'direct' would go to the quality or character of the effect and not the subject matter; and, on the other hand, they pointed out:

> that the test of 'inevitable consequence' helps to quantify the extent of direction necessary to constitute infringement of a fundamental right. Now, if the effect of state action on a fundamental right is direct and inevitable, then a *fortiori* it must be presumed to have been affected ... this is the test which must be applied for the purpose of determining whether the impugned order made under it is violative of Article 19(1)(a) or (c).

Explaining the expression 'direct and inevitable effect' as used by their Lordships in *Smt Maneka Gandhi*'s case Dr. Anand said (at p. 59 para. 102 col. 2) that the impugned action would be struck down if either it directly affects the fundamental rights or its inevitable effect on the fundamental rights is such that it makes their exercise 'ineffective or illusory'.

He then proceeded to conclude as follows: 'Since the inevitable effect of s. 24- G(a) is that it makes the exercise of right of association guaranteed under Article 19(1)(c) ineffective and illusory in so far as legislators are concerned, it must be held to be unconstitutional.'

We share Dr. Anand's view taken from the Supreme Court decision in *Smt. Maneka Gandhi*'s case, that *in testing the validity of state action with regard to fundamental rights, what the Court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise "ineffective or illusory".*

(emphasis added)

[67] It can be understood from the above case that the "inevitable effect or consequence" and whether the exercise becomes "ineffective or illusory", juxtaposed with the principle of fair trial laid down in the case of *Rackham* (*supra*), the test to be applied as to the effect of the infringement is not to wait and see whether the applicant has in fact been prejudiced but to examine the potential consequences that will follow from the infringement of such right.

[68] Following from the above, the question now turns on whether s. 154 CPC is directory or mandatory. In *R v. Sekhon and Others* [2003] 3 All ER 508, the English Court of Appeal stated as follows:

> 25 There is no doubt that difficulties for courts exist in applying the distinction between mandatory requirements, on the one hand, and directory requirements on the other. *Even if the terms "directory" and "mandatory" are not used the problem remains of answering the question "what is the effect of non-compliance with procedural requirements?" What is necessary, as indicated by Lord Campbell LC in Liverpool Borough Bank v. Turner [1860] 30 LJ Ch 379, 381, is "to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed".*
>
> 26 In a case in which the Secretary of State had failed to apply for leave to appeal on the form prescribed by statutory instrument, the Court of Appeal (Civil Division) in *R v. Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354 took very much the same view in a judgment of the then Master of the Rolls, Lord Woolf. What was stated is as follows, at p 359:

> Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that tribunal's task will be to seek to do what is just in all the circumstances: see *Brayhead (Ascot) Ltd v. Berkshire County Council* [1964] 2 QB 303, applied by the House of Lords in *London and Clydeside Estates Ltd v. Aberdeen District Council* [1980] 1 WLR 182"

This statement has since had the benefit of the endorsement of Lord Steyn in the House of Lords in *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, 117.

[69] In the same case, the court further stated:

> 29 We would expect a procedural failure only to result in a lack of jurisdiction if this was necessary to ensure that the criminal justice system served the interests of justice and thus the public or where there was **at least a real possibility of the defendant suffering prejudice as a consequence of the procedural failure.** (emphasis added)

[70] In *R v. Ashton* [2007] 1 WLR 181, again, the English Court of Appeal propounded the test to be applied as follows:

> … In our judgment it is now wholly clear that whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised ("a procedural failure"), *the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid.* If the answer to that question is no, then the court should go on to *consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure.* If there is such a risk, the court must decide whether it is just to allow the proceedings to continue. (emphasis added)

[71] It can be formulated from the above that the court must determine the intention of the Parliament in enacting the provision of the law ie, s. 154 CPC and to see whether there is real possibility that the applicant herein will suffer prejudice as a consequence of a procedural failure. The test is therefore one of potential and not the actual. In *R v. London Borough of Lambeth Council* [1988] 55 P. & C. R.232, the Court of Appeal had rejected the dichotomy between directory and mandatory and emphasised on the aim sought to be achieved by the procedural requirement in the Town and Country Planning General Regulation 1976 as to publishing a notice with respect to a planned development. The court made the following observations:

> For my part, I am satisfied that the learned judge was correct in the exercise of his discretion. In the circumstances which I have indicated, I do not regard this as a mere procedural technicality. I regard this failure to give notice in the form which is specifically required by regulation 4 as fundamental. The failure to specify the period is, in my judgment, fatal to the procedure which was being followed and accordingly fatal to the passing of the second resolution of October 13. The learned judge in this case did not have an element of delay to consider. Indeed, the applicant proceeded very promptly to make his application for judicial review in January 1984. It is impossible, in my judgment, to say that there was no prejudice to the applicant. He is a nearby resident on the opposite side of the park from the gate where the site notice was affixed and he had not seen it. Furthermore, this is a matter of general, and, apparently, of intense public interest in the locality. It was not a mere formality. Further, as the learned judge pointed out in his judgment, at the time when he was considering the application there was still ample opportunity for the matter to be considered afresh with more time for public consultation.

[72] The object of s. 154 CPC was highlighted by Augustine Paul JC (as he then was) in *Zulkiflee Mohd Dom v. PP* [1997] 3 CLJ Supp 290 where the learned judge held that:

> ... the object of section 154 is, firstly, **to ensure that the accused has sufficient notice of the matter with which he is charged** as otherwise he will be seriously prejudiced in his defence and, secondly, to enable the court to keep in view the real points in issue and to confine the evidence to such matters. This as of necessity means, in the light of the explicit provision of section 156, that **the requirements of section 154 arise for consideration before the commencement of the trial** with appropriate amendments, if necessary. In this regard, I refer to *PP v. Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 63 where Mohamed Azmi J (as he then was) in commenting on this section said at p. 66:
>
> > ... the charge must give such particulars as are necessary to enable the accused to prepare his defence or give proper instructions to his counsel before trial.

[73] In the same case, the learned judge had held further that non-compliance with s. 153 and/or 154 CPC renders the charge defective and cannot be cured so long as the objection is raised before the commencement of trial. Augustine Paul JC held as follows:

> ... Section 154 will render a charge defective if an objection to its non-compliance is taken before the commencement of the trial while section 156 will not invalidate such a charge if the objection is taken during or at the conclusion of the trial in the circumstances mentioned in the section.

[74] In the present matter, the applicant has deposed that he has suffered prejudice due to the defective charges, he cannot instruct his counsel and neither can he understand the charges. These facts are uncontroverted, and facts which are no longer *in potentia*. It is the finding of this court that from

A the uncontroverted facts deposed by the applicant juxtaposed with the object of s. 154 CPC, a breach of procedural failure has occurred which has caused prejudice to the applicant. There can never be any prejudice on the part of the respondent since they ought to know the theory of the case and the evidence to be produced. It can never be prejudicial to them to disclose the B contract in order for the applicant to be better prepared in his defence. The High Court is vested with the power and jurisdiction to arrest a wrong at *limine*. It is of the considered view that the infringement of the applicant's constitutional rights herein is an abuse of process sufficient to trigger the court's inherent power to strike out the proceedings in the Magistrate's C Court.

[75] Further, premised on the clear terms expressed by Augustine Paul JC in *Zulkiflee Mohd Dom* (*supra*), it is of the further considered view that the defective charges preferred against the applicant herein due to non-compliance with s. 154 CPC are not curable under s. 156 CPC and/or s. 158 D and/or s. 422 CPC since the objection has been raised before the commencement of the trial.

Applicability Of Section 156 CPC

[76] Foremost, this court is mindful of the argument that the courts are bound by the principle of *stare decisis* with the decision of the Court of Appeal E in *Ahmad Zubair Hj Murshid v. PP* [2014] 1 CLJ 697 where the court had held that the High Court has no general power to quash the charge and to decline to allow the trial to proceed where an indictment has been preferred in accordance with law. The Court of Appeal in that case further held that whether such error in stating the offence or the particulars or omission to F state the offence in the charge had occasioned a failure of justice could only be determined at the conclusion of the trial having regard to the entire evidence being placed before the trial judge and that any objection as to the charge before the trial commenced is premature.

G **[77]** However, with the utmost respect to the apex court's decision in *Ahmad Zubair*'s case, the *ratio* of which might tie the hands of the High Courts, this court finds that in that case, the issue on the constitutionality of s. 156 CPC was never questioned.

[78] The Privy Council in *Baker v. R* [1975] AC 774 had stated *inter alia* H that although the lower courts are bound by its decision *albeit per incuriam*, they are not bound with the proposition of law so assumed to be correct which forms part of the *ratio decidendi* and it does not create a precedent for use in the decision of other cases. The Privy Council observed as follows:

> I A consequence of this practice is that in its opinions delivered on an appeal the Board may have assumed, without itself deciding, that a proposition of law which was not disputed by the parties in the court from which the appeal is brought is correct. *The proposition of law so assumed to be correct may be incorporated, whether expressly or by implication, in the ratio*

decidendi of the particular appeal; but because it does not bear the authority of an opinion reached by the Board itself it does not create a precedent for use in the decision of other cases. (emphasis added)

[79] In *Cross and Harris, Precedent in English Law*, 4th edn, Oxford: Clarendon Press, at pp. 158-159, it is stated that:

It seems always to have been accepted that *if a proposition of law, though implicit in a decision, was never expressly stated either in argument or in the judgment, the decision constitutes no binding authority for it, whether on the ground that there is here an exception to stare decisis, or for the reason that such proposition is not truly part of the ratio.* The last fifteen years have seen a tendency to regard decisions as not binding at any level of the judicial hierarchy as to propositions expressly affirmed by them if, owing to the absence of any argument on the point, it can be inferred that the deciding court merely assumed their correctness. *In this light, decisions without argument must be viewed as a general exception to stare decisis.* (emphasis added)

[80] In *Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273, the Federal Court had dealt with the issue of the application of double presumption under s. 37(d) and s. 37(da) of the Dangerous Drugs Act 1952 after the parties conceded that the issue had not been argued in the other cases cited before the court. The Federal Court stated:

The learned deputy public prosecutor argued otherwise. *He submitted that the presumption of trafficking under s. 37(da) could be properly invoked once a presumption of possession under s. 37(d) had been established. He urged upon us not to depart from the past decisions of our courts on the double application of the presumptions of possession and trafficking.* Among the cases of this court cited, *PP v. Adetunji Adeleye Sule* [1993] 2 MLJ 70 warrants special mention. In that case, the accused was found in possession of a trunk in which heroin was discovered. It was held by the Supreme Court, on appeal, he was deemed to be in possession of the drug and to have known the nature of the drug by reason of s. 37(d) of the Act and was further presumed to be trafficking in the drug, by reason of s. 37(da) thereof. In the course of arguments before us, doubt was expressed as to whether the point now canvassed before us (ie the application of s. 37(da) upon a finding of custody or control under s. 37(d)) was raised in *PP v. Adetunji Adeleye Sule*. *Edgar Joseph Jr FCJ, a member of this panel, who was also on the panel in PP v. Adetunji Adeleye Sule and delivered the judgment of the court, with an air commanding high respect, candidly confirmed that the point had not been argued in that appeal. Likewise, the learned deputy public prosecutor also fairly and frankly conceded that the point was never previously argued and decided. That being so, we see no purpose of discussing the other cases cited by the learned deputy public prosecutor, in relation to the point in issue. The concession of the learned deputy public prosecutor also explained why we ought to deal with the issue since it had been specifically raised.* (emphasis added)

[81] It is argued by learned counsel for the applicant that if indeed the true statutory construction of s. 156 CPC is as what the Court of Appeal has decided by the Court of Appeal in *Ahmad Zubair*'s case, it would go against the Federal Constitution because not only it would tie the court's hands, it would also nullify any right of the court as a protector of its process from having any power to control and to prevent its process from being abuse. Learned counsel contends that such construction would force the courts to be a bystander and watch a trial which is essentially contrary to the Federal Constitution and s. 154 CPC to proceed, whilst the applicant is under all kinds of detriment and prejudice of being charged with defective charges. It is argued that the process of "wait and see" is unconstitutional. To this end, learned counsel contends that s. 156 CPC does not cure the errors in the present proceedings because:

(i) section 156 CPC does not cure challenges raised at the outset of proceedings that the trial is a nullity (*Zulkiflee Mohamed Dom* (*supra*));

(ii) section 156 only applies with respect to or after any finding, judgment, sentence or order passed or made by a court; or

(iii) it would be an infringement of the court's separation of powers if s. 156 can estop a court from striking out proceedings that are an abuse of process.

[82] For ease of reference, s. 156 CPC states:

> 156. Effect of errors.
>
> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

[83] Section 156 CPC is a reflection of s. 422 CPC. Section 422 CPC reads:

> 422. Irregularities not to vitiate proceedings
>
> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice

[84] The Federal Court in *Ravindran Ramasamy v. PP* [2015] 3 CLJ 421 opined that pursuant to s. 156 CPC, and in view of s. 422 CPC, for an error or omission to be material, it is not enough that the accused has been misled; there must also be a failure of justice. The court stated as follows:

> [27] Pursuant to s. 156 of the CPC, "no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission" (the Indian equivalent, s. 215 of the Indian Criminal Procedure Code, ends with the words "and it has occasioned a failure of justice"). **However, in view of s. 422, for an error or omission to be material, it is not enough that the accused has been misled; there must also be a failure of justice.** "Whether any court should apply s. 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the court would not apply s. 422, as this appears to us to be the same thing as the irregularity having occasioned a failure of justice" (*Yap Sing Hock & Anor v. PP* [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356; [1992] 2 MLJ 714 at p. 364 (CLJ) and p. 725 (MLJ) per Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court).
>
> (emphasis added)

[85] From the salutary words of that case, it can be deduced that failure of justice occurs when the principle of a fair trial is infringed where the accused could not mount a proper defence. Taking both s. 156 CPC and s. 422 CPC together, and along with the principle laid down in *Zulkiflee Mohd Dom* (*supra*) as well as by statutory construction, it is of the considered view that s. 156 and s. 422 would only apply when there is sufficient material before the court to see that the accused has been misled. Sufficient material before the court would mean when witnesses have been called or at the very least when the proceedings have reached a stage where the trial judge has sufficient material before him to conclude that the accused has been misled. Until and unless evidence or some material have been produced, the court cannot decide whether the accused has been misled or otherwise. This court agrees that s. 156 CPC only applies with respect to or after any finding, judgment, sentence or order passed or made by a court. It is of the considered view that s. 156 CPC and s. 422 CPC cannot be used to oust any objection towards defective charges taken at the outset of the trial because s. 156 CPC is not a provision which can cure the non-particularisation of the charge which is a mandatory requirement of the law under s. 154 CPC. The requirement of s. 154 CPC must first be fulfilled and s. 156 CPC cannot be a shield to any objection of non-compliance of s. 154 CPC. The words "at any stage of the case" in s. 156 CPC therefore cannot apply before the commencement of the trial. The statutory mechanism of s. 156 CPC if used to cure proceedings which is defective *ab initio* and violates the constitutional rights of an accused is an abuse of process rendering the proceedings in the Magistrate's Court a nullity.

[86] The court's judicial power cannot be eradicated by the Legislature ie, s. 156 CPC and to that extent by the power vested with the Public Prosecutor in his discretion to prefer a charge. Once a case is brought before the court, it (the court) cannot be put in a position and to be told that it cannot do anything but just wait and see on the ground that the Legislature had enacted the law which makes any objection immaterial. Even if s. 156 CPC is to be read independently of s. 422 CPC in that it can apply "at any stage of the case", then this court agrees with learned counsel's submission that it will encroach the judicial power of the court because the court will be forced to proceed with the trial notwithstanding the trial is in breach of s. 154 CPC and more importantly art. 5 FC. The court's power cannot be deposed by s. 156 CPC. If the construction of s. 156 is to make non-compliance with s. 154 CPC to be immaterial unless the accused is being misled by such error or omission, then such construction is inconsistent with art. 5(1) FC which safeguards the right to a fair trial.

[87] Since s. 156 CPC is a pre-Merdeka existing law, it must be construed and adapted so as to bring it into accord with the Federal Constitution. The Federal Constitution grants the court with the power to apply any existing law with such modifications as may be necessary to bring it into accord with the Constitution. Such power is provided under art. 162 FC which provides:

> 162. Existing Laws
>
> (1) Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State law
>
> …
>
> (6) *Any court* or tribunal *applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.*
>
> (7) In this Article "modification" includes amendment, adaptation and repeal.
>
> (emphasis added)

[88] In *Assa Singh v. Menteri Besar, Johore* [1968] 1 LNS 9; [1969] 2 MLJ 30, the Federal Court had found that the pre-Merdeka law in the form of the Restricted Residence Enactment (Cap 39 of the Laws of the Federated Malays States) is not void but it must be (although the word "may" is used in art. 162) applied with modifications to bring into accord with the Federal Constitution. Suffian FCJ (as he then was) stated as follows:

> Answering the second part of the question posed, even assuming that the Enactment is inconsistent with the Constitution, I say that the Enactment is not void but that it **must be applied** with modifications to bring it into accord with the Constitution. To bring it into accord with the Constitution, there must be read into the Enactment the constitutional rights conferred on an arrested person by art 5.
>
> (emphasis added)

[89] In *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169; [2005] 6 MLJ 289, in determining whether the plaintiffs were entitled to compensation for deprivation of their land in accordance with ss. 11 and 12 of the Aboriginal Peoples Act 1954, the Court of Appeal had taken the approach as follows:

> [41] How then do you modify s. 12 to render it harmonious with Article 13(2)? I think you do that by reading the relevant phrase in section 12 as 'the State Authority shall grant adequate compensation therefor.' **By interpreting the word 'may' for 'shall' and by introducing 'adequate' before compensation, the modification is complete.** I am aware that ordinarily we, the judges, are not permitted by our own jurisprudence, to do this. **But here you have a direction by the supreme law of the Federation that such modifications as the present must be done.** That is why we can resort to this extraordinary method of interpretation.
>
> (emphasis added)

[90] On the constitutional issue of s. 156 CPC, art. 121(1) FC which speaks on the judicial power of the federation and the case of *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor And Another Appeal* [1998] 3 CLJ 85; [1998] 3 MLJ 289 are highlighted to this court. The doctrine of separation of power being the fundamental facet of the Federal Constitution mandates a clear distinction of function of judicial, executive and legislative powers. In *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah* (*supra*), the Court of Appeal through the judgment of Gopal Sri Ram JCA (as he then was) made the followings observation:

> The Constitution of Sri Lanka (formerly Ceylon) does not even mention the expression judicial power. Yet, upon high authority it has been held that despite the omission, provisions in that document:
>
> > ... manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature (per Lord Pearce in *Liyanage v. The Queen* [1967] 1 AC 259 at p 287).

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> The Indian Constitution also does not make mention of judicial power being vested in the judiciary. Yet, the same position obtains there as in Sri Lanka. See *Minerva Mills Ltd v. Union of India*. Like the Constitutions of Sri Lanka and India, the Federal Constitution preserves the separation of powers between the three arms of Government and evinces no intention that the judicial power of the Federation shall be passed to or shared with the Executive or the Legislature. It follows that the judicial power of the Federation remains where it has always been, namely, with the judiciary.

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[91] Earlier, the Federal Court in *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112 (FC) at p. 113 of the report had stated that:

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> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislatures in Malaysia is limited by the Constitution, and they cannot make any laws they please.

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[92] In *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740; [1997] 3 MLJ 681, where the court had declared both s. 126(2) of the Securities Industry Act 1983 and s. 39(2) of the Securities Commission Malaysia Act 1993 to be unconstitutional, null and void as they contravened art. 145(3) of the Federal Constitution, Gopal Sri Ram JCA had held as follows:

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> ... Our Federal Constitution is a living document written for all time. Its language compresses within it ideas that are manifold and concepts that are multifaceted. The task of the judicial interpreter of such a document is not to place it in a coffin and nail the lid but to breathe life into it and to give effect to the full breadth and width of its great language. That is the spirit in which our courts have approached our Constitution on previous occasions …

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> There is, no doubt a presumption; even a strong presumption; that an Act of Parliament is constitutional. It would require much conviction to strike down a solemn act of legislation by a democratically elected Parliament. Nevertheless, once it has been amply demonstrated, as has been done in the present case, that an Act of Parliament contains provisions that are in direct conflict with the supreme law, it is the duty of this court to say so clearly and unequivocally.

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[93] In the recent celebrated case of *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561, the Federal Court departed from the majority view in *PP v. Kok Wah Kuan* [2007] 6 CLJ 341; [2008] 1 MLJ 1 (FC) on the construction of art. 121(1) FC and had adopted the dissenting view of Richard Malanjum CJSS (as he then was). In delivering the dissenting judgment in *Kok Wah Kuan*, the then CJSS stated as follows:

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[37] At any rate I am unable to accede to the proposition that with the amendment of art 121(1) of the Federal Constitution (the amendment) the courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.

[38] The amendment which states that 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.

[39] It must be remembered that the courts, especially the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country …

[94] In *Semenyih Jaya Sdn Bhd* (*supra*) the departure from the majority view in *Kok Wah Kuan* (*supra*) was premised on the fact that the doctrine of Parliamentary supremacy does not apply in Malaysia. The supremacy of the Federal Constitution is reaffirmed. Zainun Ali FCJ (as she then was) had succinctly and clearly elucidated the law and reaffirmed the doctrine of separation of power and judicial power vested under art. 121 FC as follows:

[60] Judicial power is best described in *Public Prosecutor v. Dato' Yap Peng* [1987] 2 MLJ 311; [1987] 1 CLJ 550, as being the power vested in the court to adjudicate on civil and criminal matters brought to it (see also the dissenting view of Richard Malanjum CJ (Sabah and Sarawak) in *Public Prosecutor v. Kok Wah Kuan* [2008] 1 MLJ 1).

…

[68] With respect, the majority decision of the Federal Court in *Kok Wah Kuan* (FC) appears to have given a narrow interpretation of art 121(1) of the Federal Constitution. It held that art. 121(1) of the Federal Constitution merely declares that the High Courts 'shall have such jurisdiction and powers as may be conferred by or under federal law' …

[69] The narrow compass within which the Federal Court in *Kok Wah Kuan* above approached art. 121(1) of the Federal Constitution suggests that the provision merely identifies the sources from which the High Courts derive their jurisdiction, namely from federal law. Whilst it is correct to say that the powers of the High Courts to adjudicate legal disputes are those which have been conferred by federal laws, in our view

A the legal implication of art. 121(1) extends well beyond that. In this connection, there is a general acceptance that the Federal Constitution has to be interpreted organically and with less rigidity (see the principle of law in *Dato Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29).

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[78] In the past, the apex court has consistently rejected Parliamentary supremacy in giving its continuing endorsement and faint praise to the Federal Court decision in *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112, in which Tun Suffian the Lord President had, in strong terms, said that:

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> The doctrine of Parliamentary supremacy does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislation in Malaysia is limited by the Constitution, and they cannot make any new law they please.

D **[95]** The Federal Court in *Semenyih Jaya* (*supra*) also referred to the Privy Council decision in *Liyanage and Others v. Reginam* [1966] 1 All ER 650; [1967] 1 AC 259, PC, emphasising that:

[85] In fact the subsequent passage in *Liyanage* is illuminating. There the court observed that:

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> … If such Acts as these were valid the judicial power could be wholly absorbed by the legislation and taken out of the hands of the judges. It is appreciated that the legislature has no such general intention. It was be set by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is
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> irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution.

G [86] Thus to put it in perspective, the judicial power of the court resides in the Judiciary and no other as is explicit in art. 121(1) of the Constitution.

…

H [88] The Judiciary is thus entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the concept of the independence of the Judiciary is the foundation of the principles of the separation of powers.

[96] On the judicial power, Her Ladyship stated as follows:

I [67] The legal consequence is that art. 121(1) of the Federal Constitution states that judicial power or the power to adjudicate in civil and criminal matters brought to the court is vested only in the court. The same position was adopted in an earlier decision of the Federal Court in the dissenting

> view of Richard Malanjum CJ (Sabah and Sarawak) in *Kok Wah Kuan* (FC) and curiously, as did the majority of the Court of Appeal in the same case; *Kok Wah Kuan v. Public Prosecutor* (CA)
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> ...
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> [114] Our Federal Constitution affirms the polemic that judicial power is exercisable only by judges sitting in a court of law; and that the judicial process is administered by them and no other.

[97] It can be understood from the above authorities that the principle applicable to the scope and definition of s. 156 CPC is that, if, in so far it has the effect of defeating the inherent powers vested with the courts to protect its process from being violated, as a pre-Merdeka law, such meaning or definition could no longer be accorded to it. This principle applies to the doctrine of "separation of powers" that protects the judicial powers of the courts from being abrogated or defeated. Therefore, any definition or objective of s. 156 CPC which would result to such power of the court being defeated or abrogated can no longer be sustained.

[98] This court has stated earlier that once a case is brought before the court, it (the court) cannot be put in a position and to be told that it cannot do anything but just "wait and see", on the ground that the Legislature had enacted the law which makes any objection immaterial. The reason is, once the charges are read to the applicant in this case, the court's jurisdiction is invoked. This court is compounded with the *dicta* of Zakaria Yatim J in the case of *PP v. Dato' Yap Peng* [1987] 1 LNS 28; [1987] 2 MLJ 311 who held:

> ... The definition of "judicial proceeding" in the Criminal Procedure Codes does not indicate when the judicial proceeding begins. Mr. Sri Ram submitted that a criminal proceeding is instituted when the charge is preferred against the accused and when the charge is registered in the Subordinate Court. I agree with his submission. *After the charge is read and explained to the accused then the Court begins to exercise its judicial power whether or not to accept the plea of the accused and whether or not to grant him bail. A case is therefore pending before the Subordinate Court once the plea is taken after the charge is read to him.* In *R v. Duffy* (1960) 2 All ER 891 893 [1960] 2 QB 188 [1960] 3 WLR 320, Lord Parker CJ said, "... it is clear on the authorities that proceedings are pending in this sense from the time that a person is charged even though he has not been committed for trial ..."

[99] In *Dato' Yap Peng* (*supra*), the Deputy Public Prosecutor tendered a certificate issued by the Public Prosecutor under s. 418A CPC and requested the case to be removed to the High Court. The application was allowed. The challenge mounted by the respondent therein relates to the validity of s. 418A CPC on the basis that it infringes art. 121(1) FC and by reason of art. 4 FC the section is null and void and of no effect. It was contended that the certificate issued by the Public Prosecutor is a nullity and the transmission and everything that follows from it is also a nullity.

[100] In the Supreme Court, the issue arose in that case was whether the Legislature can confer such absolute power on the Public Prosecutor under the impugned section? The Supreme Court held that s. 418A CPC is unconstitutional and void as being an infringement of the provisions of art. 121(1) of the Federal Constitution. Eusoffe Abdoolcader SCJ (as he then was) held:

> I have in my judgment in the *Bank Rakyat* case (at pp. 119-120) dealt with the powers of the Attorney General under Article 145(3) and the connotation of his power to "institute" and "conduct" criminal proceedings. My discourse in this regard was approved and adopted by the Federal Court in *Public Prosecutor v. Lim Shui Wang & Ors* [1979] 1 MLJ 65 (at p. 67). I said there, and I repeat, that the power of the Attorney General under Article 145(3) cannot and does not connote or extend to the regulation of criminal procedure or of the jurisdiction of the Courts or the power or discretion to do so. The power to transfer a case is a judicial power exercisable by a Court in the manner provided for in ss. 138, 177 and 417 of the Code. The power to transfer is similarly designated as a judicial power and provided for in s. 25 and para 12 in the Schedule to the Courts of Judicature Act 1964.

[101] In the same case again, the Supreme Court held that s. 418 CPC was unconstitutional on the basis that its provisions infringed on the judicial power of the Federation. The Supreme Court stated as follows:

> Section 418A(3) confers a power on the Public Prosecutor but imposes an obligation and a duty on the subordinate court to obey and comply with his requirement. The subordinate court has no discretion to act otherwise, and if it can be argued, as Encik Mohtar Abdullah, the Deputy Public Prosecutor, seeks to do, that under section 418A(3) the power to transfer still lies with the subordinate court, then it would nevertheless remain, in all its stark reality, a duty under the guise of an illusory power of a forensically cosmetic nature and rigged as such. I did in my judgment in the *Bank Rakyat* case say (at page 121) that section 418A 'is not without a tinge of polite arrogance.' In the light of the analysis the Deputy seeks to put on the provisions of section 418A(3), I would now go further to say, as I said in Court in the course of the hearing before us, that it only projects and reflects a facade of arrogance clothed in humility.
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> In my view the provisions of section 418A are both a legislative and executive intromission into the judicial power of the Federation. It is a legislative incursion to facilitate executive intrusion, and the Deputy in answer to a question I put to him had perforce to agree that in the context of subsection (3) of section 418A judicial power would amount to doing what you are told to do.
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> …
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> I cannot but conclude in the circumstances that there is in fact by the exercise of the power conferred by section 418A on the Public Prosecutor an incursion into the judicial power of the Federation and that any other view would *ex necessitate rei* result in relegating the provisions of article

> 121(1) vesting the judicial power of the Federation in the curial entities specified to no more than a teasing illusion, like a munificent bequest in a pauper's will. The power of the Public Prosecutor under section 418A is uncanalised, unconfined and vagrant.

[102] This court is reminded and agrees that the *ratio* in *Dato' Yap Peng* (*supra*) still binds this court even though the impugned section is decided to be unconstitutional *vide* art. 4(1) FC based on the fact that s. 418A CPC was only enforced in the CPC after Merdeka Day which is in the year of 1976 by virtue of Act A324. In contrast to the present case, the impugned s. 156 CPC is enforced before the Merdeka Day and as such it must be modified as may be necessary to bring it into accord with the provisions of the Federal Constitution.

[103] Premised on the authorities cited in the above, this court takes the position that in order to bring into accord with the Federal Constitution specifically art. 5 FC, s. 156 CPC cannot operate to cure any objections with regards to non-compliance with s. 154 CPC taken at the outset of the trial and, consequently, cannot mandate a trial process in breach of s. 154 CPC. In addition, s. 156 CPC will operate only when, there has been some finding, sentence or order by the trial court or when there is sufficient material upon which to adjudge that there has been prejudice occasioned to the accused.

[104] It is trite that the Federal Constitution must be construed broadly. Raja Azlan Shah Ag LP (as HRH then was) in *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1981] 1 MLJ 29 had stated:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – 'with less rigidity and more generosity than other Acts' (see Minister of *Minister of Home Affairs and Another v. Fisher and Another* [1979] 3 All ER 21. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms'. The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney General of Saint Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129 at p 136.

[105] The phrase "save in accordance with law" in art. 5(1) FC must include procedural law as well. The Federal Court in *PP v. Gan Boon Aun* [2017] 4 CLJ 41 Jeffrey Tan FCJ in delivering the judgment of the court had held:

> [16] Pertinent to 'law' in the phrase 'in accordance with law', art. 160(2) of the Federal Constitution stipulates that 'Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof', with that common law being the common law of England (see art. 160(2) of the Federal Constitution read with s. 66 of the Interpretation Acts 1948 and 1967). Article 160(2) uses the word 'includes'. Hence, art 160(2) is a non-exhaustive definition. The phrase 'in accordance with law' does not merely refer to domestic law but also to the rule of law (see *R v. Lambert* [2001] UKHL 37 at para 150 per Lord Clyde), it includes the doctrine of presumption of innocence, and does not exclude case law, judge made law, legal doctrines established by judicial precedents, or whatever that has the force of law.

[106] It is of the considered view that s. 156 CPC would be inconsistent with art. 5 FC insofar it compels the applicant to undergo a trial process based on the charges that is in non-compliance with s. 154 CPC and/or art. 5 FC before he can dispute the legality of the charges. As stated earlier, the effect of the non-compliance of s. 154 CPC would result to the applicant being unable to prepare his defence and precluded him from being able to give instructions to his lawyers for purposes of preparing his defence and/or representation. The applicant's quality of life is diminished by the fact that he is faced with defective charges where he would have to pay legal fees etc and such effects go against his right safeguarded by art. 5 FC. Section 156 would be inconsistent with art. 5 FC as the applicant is deprived of the right to be informed of the nature of the allegation against him, which is a species of a fair trial and it compels the applicant to undergo a trial process based on a defective charge.

[107] In *PP v. Raymond Chia Kim Chwee & Another Case* [1983] 1 CLJ 321; [1983] CLJ (Rep) 798; [1985] 2 MLJ 63, Mohamed Azmi J (as he then was) recognises the *raison d'etre* of the accused's right to a further and better particularisation of the charge which is to enable the accused to prepare his defence and give instruction to his lawyer:

> In the circumstances, although the respondents' applications were not properly made under section 51(i) of the Criminal Procedure Code and the order of the learned President must be set aside, I would exercise my power of revision and allow the first part of the order to remain on the ground that the respondents were entitled to further and better particulars of the charge to enable them to prepare their defence and give instructions to their counsel. Although I allow this appeal and set aside the order of the learned President, I order that photostat copies of the documents specifically referred to in the charge be supplied by the Public Prosecutor to the respondents.

[108] In *Raymond Chia* (*supra*) the rights in question was "the accused's right to a further and better particularisation of the charge" instead of "the accused's rights to be informed of the nature of the allegation" as in the present matter. Nevertheless, both rights are species of a right to a fair trial vested under art. 5 FC and the rationale behind the two rights is consonant because it is vital for the applicant to prepare his defence and give instructions to his counsel. Section 156 CPC would be inconsistent with art. 5(1) FC if it prevents the applicant from raising the non-compliance with s. 154 CPC until the applicant is in fact misled by the error or omission.

[109] In the final analysis, s. 156 CPC if it applies at any stage of the case including before the commencement of the trial, would defeat the principle of 'equality of arms' as it entails immaterial any objections as to non-compliance with s. 154 CPC. It must be reminded that a right to a fair trial would include a right to "equality of arms". Each party must be afforded a reasonable opportunity to present his case on condition that do not place him at a disadvantage *vis a vis* his opponent. In *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312 the Federal Court in approving the words of Mohd Zawawi JC (as His Lordship then was) in *PP v. Mohd Fazil Awaludin* [2009] 2 CLJ 862; [2009] 7 MLJ 741 stated as follows:

> [51] The right to a fair trial is of course a universal principle. It is inviolable. It has since been fully developed in the common law practice including here, in Malaysia. This was emphasised very recently in our High Court through the words of Mohd Zawawi JC in *Public Prosecutor v. Mohd Fazil bin Awaludin* [2009] 7 MLJ 741 at p 747, which we wholly approve. The learned JC said this:
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> > The principle of a fair trial is sacrosanct in all civilised legal jurisdictions. It is a principle of universal application. In Malaysia the principle of fair trial and fairness have been long-established and recognised in several decisions. Some of these include *Cheak Yoke Thong v. Public Prosecutor* [1984] 1 MLJ 311 and *Azahan bin Mohd Aminallah v. Public Prosecutor* [2005] 5 MLJ 334; [2004] 6 AMR 810.
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> However, it must be stressed that there are fundamental safeguards built into the law to guarantee equality and fairness in a trial. For this appeal, we have mentioned this earlier in our discussion on discovery under s. 51 of the CPC. It needs also be stated that these safeguards are to be examined against the primary consideration that the prosecution's duty is to prosecute not to defend (see Lord Goddard CJ's remarks in *Rex v. Bryant and Dickson* (1946) 31 Cr App R 146).
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> [52] Now, the words 'plans to offer in court against the accused' which we underscored above have, we think, been put in place when Parliament added s. 51A to the CPC. We need to repeat here s. 51A(1)(b) which says:
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> (1) The prosecution shall before the commencement of the trial deliver to the accused:

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(a) A copy of any document which would be tendered as part of the evidence of the prosecution;

In our view, this new provision strengthens the guarantee of a fair trial in providing the adequate facilities as purported in the general remarks document of the Human Rights Committee that was read to us. Section 51A of the CPC has, in our opinion, made the battlefield move level, to preserve the 'equality of arms principle', ensure the fairness of a trial and ultimately uphold the very integrity of the courts in its administration of criminal justice. This should also be considered in the light of our criminal justice system where the burden of proof lies throughout on the prosecution, which, together with the common law principle of presumption of innocence, safeguard that fairness.

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[110] In the upshot, the power of the Attorney General exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence pursuant to art. 145(3) FC will always be recognised but once the matter is brought before the court and contested, the court has the inherent powers to address the matter and remedy the situation. Section 156 CPC cannot tie the court's hand and mandates a trial in which the applicant is deprived in preparing his defence and quality of life. It would infringe art. 5 FC and the rule of law under art. 162(2) FC. The Federal Court in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1 through the judgment of Chief Justice Richard Malanjum (as he then was) had stated:

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[106] It is therefore clear that the 'law' in the proviso 'save in accordance with law' does not mean just any law validly enacted by Parliament. It does not authorise Parliament to enact any legislation under art. 5(1) contrary to the rule of law. While the phrase 'in accordance with law' requires specific and explicit law that provides for the deprivation of life or personal liberty (see *In Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372 at p 378), nevertheless such law must also be one that is fair and just and not merely any enacted law however arbitrary, unfair, or unjust it may be. Otherwise that would be rule by law.

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[107] The 'law' thereof also refers to a system of law that incorporates the fundamental rules of natural justice that formed part and parcel of the common law of England. And to be relevant in this country such common law must be in operation at the commencement of the FC. Further, any system of law worthy of being called just must be founded on fundamental values. 'The law must be related to the … fundamental assessments of human values and the purposes of society' (per Viscount Simonds, *Shaw v. Director of Public Prosecutions* [1962] AC 220 at p 268). As persuasively argued by Lord Bingham, the rule of law requires that fundamental rights be protected, (see *Bingham, The Rule of Law* (London: Penguin Books, 2011 at pp 66-68). It is also taken for granted that the 'law' alluded to would not flout those fundamental rules. As Lord Diplock stated in no weak terms, to hold otherwise would render the purported entrenchment of fundamental liberties provisions in the FC 'little better than a mockery' (see *Ong Ah Chuan* at p 670)

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[109] Accordingly, art 5(1) which guarantees that a person shall not be deprived of his life or personal liberty (read in the widest sense) save in accordance with law envisages a state action that is fair both in point of procedure and substance. In the context of a criminal case, the article enshrines an accused's constitutional right to receive a fair trial by an impartial tribunal and to have a just decision on the facts (see *Lee Kwan Woh* at para 18).

Conclusion

[111] Premised on the above reasons, this court has allowed the application and the amended charges preferred against the applicant in the Magistrate's Court were struck out.